

# THE YALE LAW JOURNAL

VOLUME 51

JANUARY, 1942

NUMBER 3

## "WHEN 'OMER SMOTE 'IS BLOOMIN' LYRE"\*

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THE views of an early seventeenth century English lawyer on the doctrine of separation of governmental powers would not ordinarily appear to be of much interest to the contemporary bar. But lawyers love precedent, and the utterances of Edward Coke are rapidly coming to be the keynote of a widespread criticism of our modern administrative agencies. He won a great struggle, it is urged, in establishing the supremacy of the judiciary by opposing the union of governmental powers in the agencies of his day which, it is said, correspond to the commissions of our time. And his influence upon the fathers of our Constitution was, it is asserted, tantamount to an enactment of his views into the Constitution. It is perhaps not heretical to suggest that the thesis that administrative agencies are bad was formulated first, and that Coke's *Institutes* was consulted afterward, so that if a re-examination of the famous 17th century feud between Coke and his sovereign demonstrates its historical inaccuracy, the administrative agencies will not necessarily be removed from attack. But many lawyers operate on the theory that any kind of precedent-exposing pays dividends of some kind. With that in mind, we may not find it wholly academic to venture into the realm of history.

Coke, we are told, in the early part of the 17th century, valiantly led the English lawyers and judges of his day in a fight to curb the despotism of the first two Stuart kings, James I and Charles I. It is said that

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\*This article will appear as a chapter of a book entitled *IF MEN WERE ANGELS*, to be published soon. The preceding chapter will discuss the historical accuracy and influence of Montesquieu's description of the English government as divided into three separate branches. The following chapter will deal with the relation of the doctrine of separation of powers to constitutional "checks and balances."

It may be well to note that the present article is a historical essay, and should not be taken as an evaluation of the practical effect or wisdom of a separation of powers; such an evaluation will be attempted elsewhere in the forthcoming book.

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in that fight Coke asserted the doctrine of judicial supremacy: that the judges should be both independent of, and superior to, both the legislative (Parliament) and the executive (the king). A wag might characterize that doctrine, as ascribed to Coke, as one calling for "*a government of lawyers, and not of men.*"<sup>1</sup> It is said that Coke, in the contest with the Crown, also assailed, as instruments of despotism or royal absolutism, all administrative bodies, and vigorously opposed the merging in any one governmental agency of judicial and administrative powers. And — so the story goes — the writings of Coke reporting that conflict with the Crown had a vast influence in the shaping of the early American state constitutions and our Federal Constitution, for Coke's attitudes were reinforced by the experiences of the American colonists in their dealings with the English government. Thus we are asked to arrive at this conclusion: Under Coke's influence, those American constitutions exalted the courts and demeaned the legislature and the executive. And — here we come to current attacks on existing American administrative agencies — those constitutions, it is said, embodied Coke's indignation at the joinder of administrative and judicial functions. The Bills of Rights in those constitutions, it is alleged, were accordingly motivated by "a traditional jealousy of administrative activity;" they reflected, it is said, Coke's deep distrust of the "administrative-judicial tribunals of 17th century England," the "administrative agencies of the Tudors and Stuarts," with mixed powers, as reported "in Coke's Fourth Institute," which "was almost a bible when our Bills of Rights were framed."<sup>2</sup>

It is conceded, to be sure, that, long after Coke's death, as a result of the English "bloodless revolution" of 1688, there was established, as the basis of English constitutional law, the doctrine of the supremacy of the legislature (Parliamentary sovereignty). But that development, we are advised, had no effect on the thinking of our American statesmen in the 18th century when the American constitutions were being adapted; "the legal-political constitutional organization which we developed in America" was based "on the ideas of common-law lawyers taken over from 17th century England. Our constitutional ideas are those of the

1. "If, however, the law was to be supreme, and at the same time a mystery open only to the initiated, it is clear that if the claim of the lawyers was to be admitted, the supreme authority would be their exclusive possession." MCLWAIN, *THE HIGH COURT OF PARLIAMENT* (1910) 80-81. "If this theory had been generally accepted, the judges would have become the ultimate law givers of the realm . . ." MAITLAND, *CONSTITUTIONAL HISTORY OF ENGLAND* (1908) 301.

2. See *Report of the Special Committee on Administrative Law* (Roscoe Pound, Chairman) (1938) 63 *REPORTS OF AMERICAN BAR ASSOCIATION* 331, 352 *et seq.*; POUND, *CONTEMPORARY JURISTIC THEORY* (1940) 25 ff; Pound, *The Place of the Judiciary in a Democratic Polity* (1941) 27 *A.B.A.J.* 133; *cf.* POUND, *SPIRIT OF THE COMMON LAW* (1921) 60 ff.

Puritan Revolution, not of England after 1688."<sup>3</sup> The "age of Coke was the age of the puritan in England."<sup>4</sup> As a consequence, we are told, in the state constitutions adopted after the Declaration of Independence, the then contemporary English doctrine of legislative supremacy was rejected, and peculiarly strong curbs were put on the exercise of executive functions. "Our own constitution was framed and adopted under the influence of that dread of royal power which had dictated the line of English constitutional development during two preceding centuries. The functions of the king in which the development had left him least fettered—the functions which remained to him after the sphere of Parliament and the courts had been broken off—were those which our Constitution assigned to what we call the executive department; and hence the exercise of those functions and the power of the officials in whom they are vested are with us the most jealously hemmed in by constitutional limitations."<sup>5</sup>

We may pass by, without extended discussion, the question of whether Coke ever espoused the doctrine of judicial supremacy. His opinion in *Dr. Bonham's Case*<sup>6</sup> contains language which some scholars have so interpreted,<sup>7</sup> but others disagree with that interpretation,<sup>8</sup> some of them

3. POUND, *CONTEMPORARY JURISTIC THEORY* (1940) 25. But see the statement in POUND, *THE FORMATIVE PERIOD OF AMERICAN LAW* (1938) 41-42, that in the period after independence, Americans were influenced by "the English polity after 1688" which made them "familiar with a sovereign legislature." It is interesting to contrast Pound's present thesis with that of Vanderbilt, who says that our American doctrine of the separation of powers was "inherited . . . from English experience" and "was the outstanding principle of the English Constitution in the eighteenth century." Vanderbilt, *Hearings before Senate Subcommittee of the Committee on the Judiciary on S. 674, S. 675 and S. 918, 77th Cong., 1st Sess.* (1941) 1308. Vanderbilt, on the same occasion, said that the "doctrine of separation of powers is directed primarily to obtaining the independence of the judiciary." But cf. Pargellis, *Balanced Government in THE CONSTITUTION RECONSIDERED* (Read's ed. 1938) 37, 38.

4. Pound, *Justice According to Law* (1914) 14 *COL. L. REV.* 1, 23; POUND, *THE SPIRIT OF THE COMMON LAW* (1921) 42.

5. DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927) 97. Dickinson, in a later writing, seems to have abandoned that position; see *Checks and Balances* (1932) 3 *ENCYC. SOC. SCIENCES* 363.

6. 8 Coke's Reports 114a.

7. See, e.g., McILWAIN, *THE HIGH COURT OF PARLIAMENT* (1910) 285 ff; MAITLAND, *CONSTITUTIONAL HISTORY OF ENGLAND* (1908) 301; see also POUND, *SPIRIT OF THE COMMON LAW* (1921) 75; but see what appears to be an opposite view in POUND, *INTERPRETATIONS OF LEGAL HISTORY* (1923) 3. The difference may be explained—although Pound does not so explain it—by the adoption of McIlwain's thesis that Coke thought of Parliament primarily not as a legislative body but as the highest court in England.

8. See, e.g., 4 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (1924) 186-87; THORNE, *The Constitution and the Courts: A Reexamination of the Famous Case of Dr. Bonham* in *THE CONSTITUTION RECONSIDERED* (Read's ed. 1938) 15.

pointing to the fact that Coke later, in his *Fourth Institute* said: "Of the powers and jurisdiction of Parliament for the making of laws in proceeding by bill, it is so transcendent and absolute, as it cannot be confined either for cases or persons within any bounds."<sup>9</sup>

At any rate, the suggestion that Coke is the embodiment of the ideas of the Puritan Revolution is quaint: Coke was never a Puritan but a member of the Anglican Church. True, in his later years, he allied himself with the Puritan party in Parliament. But Coke died in 1634, and would almost surely, had he lived, have opposed the beheading of Charles I in 1649. Cromwell, who had little patience with lawyers, would not have brooked him as an adviser. Coke wanted to restore what he considered the ancient ways and would have been horrified at the drastic changes in governmental structure which occurred as a result of the Revolution. Harrington, who reflected many of the views of that era, says nothing of an independent judiciary. And, if Coke believed in judicial supremacy, such an attitude was not shared by Puritan writers of the revolutionary period such as Milton or Filmer.<sup>10</sup>

Coke's alleged fight for an independent judiciary would, of course, not prove that he urged judicial supremacy; England today has the former but not the latter. But even the conventional story of Coke's independence as a judge has been questioned. His own report,<sup>11</sup> since become famous, of a meeting with James I, in which Coke pictures himself as courageously defying that monarch, is probably untrustworthy;<sup>12</sup> there is evidence to the effect that, when James was angered by some of Coke's remarks at that meeting, Coke "fell flat on all fower," and groveled before the king.<sup>13</sup> And whatever may have been the reason for Coke's later dismissal from the bench<sup>14</sup> — where, some writers think, he had been anything but a model of a dispassionate judge<sup>15</sup> — there is

9. 4 COKE'S INST. 36. For divers views as to the meaning of that passage, see McILWAIN, *op. cit. supra* note 7; 4 HOLDSWORTH, *op. cit. supra* note 8; Corwin, *The 'Higher Law' Background of American Constitutional Law* (1928) 42 HARV. L. REV. 365, 374-79; cf. 4 COKE'S INST. 25. And see GOEBEL, *CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS* (1937) 744-45.

10. See MOTT, *DUE PROCESS OF LAW* (1926) 55.

11. 12 COKE'S REPORTS 63b-65.

12. Usher, (1903) 18 ENG. HIST. REV. 664; cf. 2 USHER, *RECONSTRUCTION OF THE ENGLISH CHURCH* (1910) 312-16; USHER, *THE RISE AND FALL OF THE HIGH COMMISSION* (1913) 188-90; 5 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (1924) 430-31.

13. See authorities cited *supra* note 12.

14. There is some evidence that the dismissal was precipitated by a row between Coke and the royal favorite over patronage. Cf. 1 JOHNSON, *THE LIFE OF SIR EDWARD COKE* (1845) 328 ff.

15. It has been said by divers writers that "Coke's temperament was passionate and emotional rather than judicial;" that he had a "proneness to maltreat precedents in supporting his views;" and vacillated "in legal tenets when the interests of partisanship

no doubt whatever that, far from then fighting with the king, he spent the next four years as a sycophant trying to regain the royal favor. Only after his boot-licking efforts had failed, did Coke, in the later years of his life, become one of the leaders, in Parliament, of the opposition to the extensive prerogatives asserted by the Crown. The attitude he took, as one of the authors of the Petition of Rights in 1628, toward the king's prerogatives, flatly contradicted the views he had expressed when—as attorney general and as judge—he was not out of favor with the king.<sup>16</sup>

Nevertheless, in colonial America, the legendary Coke was believed in, and his opinion in *Dr. Bonham's Case* was cited by Otis in 1761 as authority for the position that unreasonable and oppressive legislation was invalid and should be disregarded by the courts.<sup>17</sup> But while Coke's views might plausibly have been cited to support that proposition, nothing in his writings could have led anyone in America or elsewhere to believe that he had any such notion of separation of powers as Montesquieu's: He praised Parliament, which was both a court and a legislature. His attacks on the High Commission, an ecclesiastical court,<sup>18</sup> and on other courts and governmental agencies, were always based on his contention that they were exercising powers which had not been conferred on them by Parliament.<sup>19</sup> He never suggested that Parliament could not lawfully have conferred such powers, or that there was anything inherently dangerous in a combination of judicial and executive or legislative functions. Coke held that the Commissioners of Sewers—who had jurisdiction over drainage ditches and the like—could be

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pressed;" that "he was too fond . . . of telling untruths to support his own opinions;" that he "yielded to the temptation of misquoting authorities where they clashed with his views;" that "on the Bench he was always in a sense the advocate striving to force acceptance of his opinion" and "was not sufficiently aware of the need to listen to argument." See 7 & 8 WIGMORE, EVIDENCE (3d ed. 1940) § 2036, n. 3, § 2250, n. 91; MacKay, *Coke—Parliamentary Sovereignty or the Supremacy of Law?* (1923) 22 MICH. L. REV. 215, 216; BIRKENHEAD, FOURTEEN ENGLISH JUDGES (1925) 37, 38, 44-46, 50; USHER, RISE AND FALL OF THE HIGH COMMISSION (1913) 191-92; 5 HOLDSWORTH, *op. cit. supra* note 12, at 44-46, 437, 472-81; cf. Dawson, *Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616* (1941) 36 ILL. L. REV. 127, 133.

16. See, e.g., 1 JOHNSON, THE LIFE OF SIR EDWARD COKE (1845) 73-74, 90-92, 324-29, 427; 2 *id.* at 3, 29-30, 68, 73-88, 311-12; 5 HOLDSWORTH, *op. cit. supra* note 12, at 427-28; WIGMORE, EVIDENCE (3d ed. 1940) § 2036, n. 3. The writer hopes, before long, to publish a book in which Coke's career will be discussed more in detail.

17. Corwin, *supra* note 9, at 398.

18. That the High Commission and the Star Chamber were courts and not mere administrative agencies, see GOEBEL, CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS (1937) 297; USHER, RISE AND FALL OF THE HIGH COMMISSION (1913).

19. See, e.g., The Case of the Lords Presidents of Wales and York, 12 Coke's Reports 50.

prevented by the courts from acting outside their statutory authority;<sup>20</sup> but their granted authority was generously interpreted, without any objection from Coke, and it included both the power to enter specific orders (judicial power) and to make subordinate laws and ordinances (legislative power).<sup>21</sup> His successful, but intellectually dishonest, attack on the court of Admiralty,<sup>22</sup> and his fortunately unsuccessful campaign against the Court of Chancery did not in the least spring from an animosity toward administrative bodies, or toward the combining of governmental powers in one agency. Some legal historians, with whom Chief Justice Taney and Mr. Justice Story concur, suggest that Coke's battles with several of the non-common-law tribunals were motivated by a jealousy which involved financial considerations—a desire of Coke, a common law judge, to avoid loss of business for common law judges whose incomes derived largely from fees paid by litigants in the common law courts.<sup>23</sup>

Whether or not that be true, this, undeniably, is true: *Coke never even murmured a protest against the notorious fact that the Privy Council and the Star Chamber—Coke sat in both—each exercised combined judicial and administrative powers of an extensive character such as no existing American federal agency possesses, or wants to possess. Not only did he not thus protest, but, late in life, even when he was in open opposition to the Crown, Coke described the Star Chamber as "the most honorable court (our Parliament excepted) that is in the Christian world."*<sup>24</sup> And that hearty approbation of that "administrative-judicial tribunal" is contained in Coke's *Institutes* which, we are told, constituted "almost a bible when our [American] Bills of Rights were framed." If, then, our 18th century American statesmen were influenced by Coke's writings, they surely were not thereby induced to regard with disfavor a governmental agency with mixed administrative, legislative and judicial powers.<sup>25</sup>

20. The Case of Thester Mill Upon the River of Dee, 10 Coke's Reports 137b; Keighley's Case, 10 Coke's Reports 139a; The Case of the Isle of Ely, 10 Coke's Reports 141a; see 4 COKE'S INST. 275-76 on "The Court of the Commissioners of Sewers."

21. Keighley's Case, 10 Coke's Reports 139a. See 10 HOLDSWORTH, HISTORY OF ENGLISH LAW (1938) 199-206.

22. 1 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1922) 553 ff.

23. CAMPBELL, LIVES OF THE CHANCELLORS (1845) 184-85; USHER, RISE AND FALL OF THE HIGH COMMISSION (1913) 55; Taylor v. Carry, 20 How. 583, 612-17 (U. S. 1857); Fisher v. Carey, 173 Cal. 185, 159 Pac. 577 (1916); cf. The Jerusalem, 13 Fed. Cas. 559, No. 7,293 (D. Mass. 1814); Harden v. Gordon, 11 Fed. Cas. 480, No. 6,047 (D. Me. 1823); De Lovio v. Boit, 7 Fed. Cas. 418, No. 3,776 (D. Mass. 1815); I BENEDICT, ADMIRALTY (5th ed. 1925) 781, 756.

24. 4 COKE'S INST. 65.

25. Cf. Corwin, *supra* note 9, at 375-79; GOEBEL, CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS (1937) 758; McILWAIN, *op. cit. supra* note 7, *passim*.

Whatever may have been Coke's influence at the time, certainly it is not true that the constitutions of the American states, adopted after independence was declared, assigned the position of top dog to the courts or, generally, adhered to the principle of separation of powers.<sup>26</sup> Typical of the inaccuracies of the thesis we are examining is the statement that, peculiarly in Pennsylvania, ideas emanating from Coke and other English 17th century writers prior to 1688 reinforced the unfortunate experiences of the Pennsylvania colonists with the English Privy Council so that they "understood the need of . . . separation of powers."<sup>27</sup> The actual fact is that the provisions of, and the practices under, the Pennsylvania constitution, adopted after Pennsylvania declared its independence of England (Benjamin Franklin being one of its authors), disclosed little regard for any such separation of governmental powers. Madison, in *The Federalist*, Nos. 47 and 48, gives a contemporary's report. He tells how, under that Pennsylvania constitution, "cases belonging to the judiciary department" had been "frequently drawn within legislative cognizance and determination;" that "the executive department" consisted of so many members so selected that "it has as much affinity to a legislative assembly as to an executive council;"<sup>28</sup> that under its constitution "the president, who is the head of the executive department, is annually elected by a vote in which the legislative department predominates," and, "in conjunction with the executive council . . . appoints the members of the judiciary department, and forms a court for impeachment of all officers, judiciary as well as executive;" the "judges of the Supreme Court and justices of the peace seem also to be removable by the legislature, and the executive power of pardoning in certain cases" is "referred to the same department;" and that "the members of the executive council are made ex-officio justices of peace throughout the state." Neither the president nor the executive council could veto acts of the legislature or otherwise hamper it. A critic of that constitution complained that the judiciary was wholly dependent upon the legislators "who may remove any judge from his office *without trial* for anything they please to call 'misbehavior'."<sup>29</sup>

26. Certainly it was not embodied in the Articles of Confederation.

27. POUND, *CONTEMPORARY JURISTIC THEORY* (1940) 25.

28. It consisted of thirteen members, chosen every three years by the voters.

29. Italics supplied. See NETTELS, *THE ROOTS OF AMERICAN CIVILIZATION* (1938) 666. In 1939, Pound made reference to the separation of powers in the Virginia Constitution of 1776 (1939) 11 VA. STATE BAR ASS'N PROC. 372, 375. His remarks on that subject should be compared with those of Madison in *THE FEDERALIST*, No. 47 (1842 ed.). He pointed out that, under that constitution, justices of county courts were eligible to sit in the legislature; that the chief magistrate and his executive counsel were appointable by the legislature, as were all the principal officers, both executive and judiciary; and the executive power of pardon was in one instance vested in the legislature. In *THE FEDERALIST*, No. 66 (1842 ed.), Hamilton pointed out that in New York "the judiciary

It is true that, in that period, there was a general distrust of the executive. But the chief check on executive power then provided by most constitutions was not the courts, but—as in England after 1688—a powerful legislature.<sup>30</sup> There was “a decided hostility towards law and lawyers.”<sup>31</sup> The pattern followed by the constitution makers of that period was—contrary to the thesis described above—closer to the English post-1688 conception of legislative supremacy than to earlier English notions.<sup>32</sup>

Under many of those American state constitutions, as in Pennsylvania, the legislatures exercised judicial power. Although, if Coke actually believed in judicial supremacy, he would have been horrified at what happened under those constitutions, yet interestingly enough, that practice appears to have been, in part, the result of a state of affairs which Coke would have applauded—the absence of courts of equity. “In the general absence of courts of Chancery,” writes Corwin, “it became a frequent practice in many of the states for the legislature to intervene in the proceedings of the ordinary courts, annulling or modifying their judgments, reopening private controversies and even determining them by ‘special acts’.”<sup>33</sup>

In truth, it was the subsequent conservative reaction to the exercise of their powers by those powerful state legislatures after 1776 that later led to the adoption, in our Federal Constitution, of devices deliberately designed to augment both executive and judicial powers in order to curb the legislative branch. The debates in the Constitutional Convention make this plain. “Madison, Wilson, Hamilton, Gouverneur Morris, Randolph and Mason spoke bluntly about their fear of the danger to minority interests, and particularly property, from popular rule. . . . For bulwarks against popular tyranny, reliance was placed particularly on the senate and executive. The importance of efficiency was urged, particularly in connection with the executive . . . Madison’s speeches . . . indicate that his fear of the legislature and his desire for a strong executive were fundamental. . . . He . . . argued strongly, from the

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authority . . . in the last analysis, may with truth, be said to reside in the Senate,” and that much the same was true in New Jersey.

30. DICKINSON, *op. cit. supra* note 5, at 97-98, recognizes this fact for a moment and then forgets it. For summaries of the constitutional provisions exalting the legislatures, see MERRIAM, *AMERICAN POLITICAL THEORIES* (1903) 80-82; NETTELS, *THE ROOTS OF AMERICAN CIVILIZATION* (1938) 663 ff.

31. Compare Goebel, *Constitutional History and Constitutional Law* (1938) 38 COL. L. REV. 555, 567, n. 33. Cf. *Bridges v. California*, 10 U. S. L. WEEK 4064, 4066 (U. S. 1941).

32. Schneider says that “our federal constitution and its amendments” are “in contents and theory closer to 1689 than to 1776.” *Constitution and Bill of Rights in THE CONSTITUTION RECONSIDERED* (Read’s ed. 1938) 143, 155 n.

33. *Judicial Review*, (1932) 8 ENCYC. SOC. SCIENCES 458. Pound, in 1914, had recognized these facts. See *Justice According to Law* (1914) 14 COL. L. REV. 1, 7.



danger of legislative tyranny, for the necessity of executive independence. . . . Adams [in his *Defense of the Constitution*] urged the importance of a strong executive."<sup>34</sup> And the same is true of *The Federalist*. The obvious drive there disclosed is against the possibility of a popularly controlled legislature: "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."<sup>35</sup> . . . "We have seen that the tendency . . . is to an aggrandizement of the legislative, at the expense of the other departments."<sup>36</sup> "The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connection with each other as the nature of their common functions and their common dependence on the society will admit."<sup>37</sup>

All too evident is a distrust not of executive power but of popular government; a fear that the people, if unchecked, will use the legislature to assert their will.<sup>38</sup> Adams,<sup>39</sup> Hamilton<sup>40</sup> and Madison were

34. Sharp, *Classical American Doctrine of "the Separation of Powers,"* (1935) 2 U. OF CHI. L. REV. 385, 399, 420, 423, 424. See also CORWIN, *THE TWILIGHT OF THE SUPREME COURT* (1934) 126 ff.

35. *THE FEDERALIST*, No. 47 (1842 ed.).

36. *THE FEDERALIST*, No. 49 (1842 ed.).

37. *THE FEDERALIST*, No. 51 (1842 ed.).

38. *THE FEDERALIST*, Nos. 9, 10, 48, 51, 63 (1842 ed.).

39. Adams, in his *DEFENSE OF THE CONSTITUTION* (1787) said: "The passions and desires of the majority of the representatives being in their nature insatiable and unlimited by any thing within their own breasts, and having nothing to control them without, will crave more and more indulgence, and, as they have the power, they will have the gratification. . . . The proposition that the people are the best keepers of their own liberties is not true. They are the worst conceivable, they are no keepers at all; they can neither judge, act, think, or will, as a political body. Individuals have conquered themselves; nations and large bodies never." Elsewhere he said: "If you give more than a share in the sovereignty to the democrats, that is, if you give them the command or preponderance in the sovereignty, that is, the legislature, they will vote all property out of the hands of you aristocrats, and if they let you escape with your lives, it will be more humanity, consideration, and generosity than any triumphant democracy ever displayed since the creation. And what will follow? The aristocracy among the democrats will take your places, and treat their fellows as severely and sternly as you have treated them." Quoted in 1 PARRINGTON, *MAIN CURRENTS IN AMERICAN THOUGHT* (1927) 315-16; cf. MERRIAM, *op. cit. supra* note 30, at 126 ff.

40. Hamilton said: "All communities divide themselves into the few and the many. The first are the rich and well born, the other the mass of the people. The voice of the people has been said to be the voice of God; and, however generally this maxim has been quoted and believed, it is not true in fact. The people are turbulent and changing; they seldom judge or determine right. Give, therefore, to the first class a distinct, permanent share in the government. They will check the unsteadiness of the second; and, as they cannot receive any advantage by a change, they therefore will ever maintain good government. Can a democratic assembly, who annually revolve in the mass of the people, be supposed steadily to pursue the public good? Nothing but a per-

avowedly desirous of protecting the "rich and well born" from the "turbulent" passions of the populace.

In *The Federalist*, No. 10, Madison refers to "complaints . . . heard everywhere from our most considerate and virtuous citizens . . . that our governments are too unstable; that the public good is disregarded . . . and that measures are too often decided, not according to the rules of justice and the minor party, but by the superior force of an interested and overbearing majority. . . . When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good, and private rights, against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add that it is the great *desideratum* by which alone this form of government can be rescued from the opprobrium under which it has so long labored, and be recommended to the esteem and adoption of mankind.

"By what means is this object attainable? Evidently by one of two only. Either the existence of the same passion or interest in a majority, at the same time, must be prevented; or the majority, having such co-existent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression. If the impulse and the opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control." In *The Federalist*, No. 51, it was said: "Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. . . ."

In the debates in the Federal Constitutional Convention, it was made plain that suffrage must be based on property qualifications.<sup>41</sup> It was finally agreed that the Constitution should contain no such provision. But it was provided that Senators were to be elected by the state legislatures, and that members of the House from each state were to be chosen by those eligible to vote for the lower house in that state, it being well known that the constitutions of most of the several states required property qualifications for the suffrage.<sup>42</sup>

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manent body can check the imprudence of democracy. Their turbulent and uncontrollable disposition requires checks." I ELLIOT'S DEBATES (1836) 421, 422.

41. See, e.g., Madison's remarks quoted in BEARD, *AMERICA IN MIDPASSAGE* (1939) 935; note also his later views quoted by BEARD, 936-37. See MERRIAM, *op. cit. supra* note 30, at 84.

42. Compare *THE FEDERALIST*, No. 25 (1842 ed.). Popular influence on government was to be checked, inter alia, by the indirect method of electing the President and the Senate and the checks imposed on the House by the Senate; cf. *THE FEDERALIST*, Nos. 39 & 68 (1842 ed.).

It is beyond possible doubt that there was no desire that executive powers should be "jealously hemmed in by constitutional limitations." No one can plausibly so assert who reads the following excerpt from *The Federalist*, No. 70:<sup>43</sup> "There is an idea, which is not without its advocates, that a vigorous executive is inconsistent with the genius of republican government. The enlightened well-wishers to this species of government must at least hope that the supposition is destitute of foundation; since they can never admit its truth, without, at the same time, admitting the condemnation of their own principles. Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. . . . A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution: and a government ill executed, whatever it may be in theory, must be, in practice, a bad government." As Merriam puts it, "On the whole, *The Federalist's* discussion of the legislative and executive powers indicates a decided change in political theory since the days when the legislature had been implicitly trusted and the executive degraded and despised. There is now manifested a decided suspicion of the legislative, and great anxiety as to the possible extent of its encroachments. On the other hand, there is a strong disposition to revive the executive department and intrust it with substantial powers. . . . *The Federalist* . . . contended boldly for an energetic executive, maintaining that this is essential to any efficient government."<sup>44</sup>

It is a significant fact that while, in our Constitution, "the legislative and judicial powers are carefully enumerated," yet "with respect to the powers of the executive the language is very vague. . . ."<sup>45</sup> "It is impossible," it has been said,<sup>46</sup> "to read that instrument, without being forcibly struck with the loose and unguarded terms in which the powers and duties of the President are pointed out. So far as the legislature is concerned, the limitations of the Constitution are, perhaps, as precise and strict as they could safely have been made; but in regard to the executive, the convention appears to have studiously selected . . . loose and general expressions. . . ." And in the Virginia debates which

43. See also *THE FEDERALIST*, Nos. 48, 49, 51 & 68 (1842 ed.).

44. MERRIAM, *op. cit. supra* note 30, at 114-15.

45. Tansill, *War Powers of the President* (1930) 45 *POL. SC. Q.* 1, 2.

46. UPSHUR, *A BRIEF ENQUIRY INTO THE TRUE NATURE AND CHARACTER OF OUR FEDERAL GOVERNMENT* (1863) 116. See CORWIN, *THE TWILIGHT OF THE SUPREME COURT* (1934) c. III.

led to the ratification of the Constitution, "Madison with his associates, Randolph, John Marshall, Corbin, Johnson, Lee, Nicholas, Pendleton, and Stephen," emphasized "the necessity for a checked legislature, and a strong executive."<sup>47</sup>

The men who were instrumental in procuring the adoption of the Federal Constitution were prominent in the first session of Congress. In that session, Vice-President John Adams told the Senate that it would be unwise to address the chief executive merely as "President." There was, he said, little dignity in a title applied to "presidents of fire companies and cricket clubs. . . . A committee . . . recommended the title, 'His Highness the President of the United States of America and Protector of Their Liberties'."<sup>48</sup>

The Constitution created an independent federal judiciary. An independent judiciary, however, is not, necessarily, one which has the power to declare legislation invalid, as the present status of the English courts shows. But, although Madison's attitude on the subject was equivocal,<sup>49</sup> there would seem to be little doubt that the founding fathers intended the federal courts to exercise such power.<sup>50</sup> That, however, does not at all mean that their basic purpose was to pit the courts against the executive. Instead, their basic and avowed aim was to use both courts and executive to restrain the legislature.

But it has been suggested that the Bill of Rights in our Federal Constitution, consisting of the first ten amendments, had the primary purpose of curbing the executive. That, too, is a thesis difficult to maintain. The Bill of Rights was adopted under the leadership of Madison who believed in a strong executive,<sup>51</sup> and, in large part, under pressure from Jefferson and his adherents. Jefferson, at that time,<sup>52</sup> chiefly feared the legislative, and thought the Bill of Rights would be a "legal check" on it, in the hands of the judges who should be independent but "kept strictly to their own department."<sup>53</sup>

There is, above all, a fatal flaw in the effort to support any separation of powers argument solely in terms of historical influences: It is

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47. Sharp, *supra* note 34, at 429.

48. BATES, *THE STORY OF CONGRESS* (1936) 8.

49. CORWIN, *COURT OVER CONSTITUTION* (1938) 32-33, 47-50.

50. See *THE FEDERALIST*, No. 78 (1842 ed.); BEARD, *THE SUPREME COURT AND THE CONSTITUTION* (1912).

51. We have already noted his attitude in the debates in Virginia on the adoption of the Constitution; cf. *THE FEDERALIST*, Nos. 47, 48, 63 (1842 ed.).

52. See his letter of March 15, 1789, to Madison.

53. That Jefferson ever believed in judicial supremacy may well be doubted in the light of his low estimate of lawyers and his subsequent tilt with Marshall. See NOCK, *JEFFERSON* (Home Foundation Lib. ed. 1926) 39, 41, 229-31, 268, 222; CORWIN, *COURT OVER CONSTITUTION* (1938) 69; Franklin, *Brutus, The American Practor* (1940) 15 *TULANE L. REV.* 16, 31, 45; Franklin, *The Judiciary State* (1940) 3 *NAT. LAWYERS GUILD Q.* 27, 28-38.

impossible to single out Coke, or Harrington, or Locke, or Montesquieu or Blackstone, or any other thinker, or any combination of thinkers, and say, "This was *the* influence that directed the thinking of the 18th century Americans who framed the constitutions of that period."<sup>54</sup> Locke was influential, but he made the legislature more powerful than the executive or the courts; that proposal was consonant with most of the early state constitutions, but not with the Federal Constitution. Montesquieu's theory of a triad division of powers had some effect, but in diluted form,<sup>55</sup> and he opposed any power in the legislature to impeach the executive, an idea which was embodied in our Federal Constitution. Coke, whether or not correctly, was interpreted by the American colonists as advocating the power of courts to strike down unreasonable legislation; there was much praise of that idea prior to 1776, but not in most of the thirteen states, when, after independence, they adopted their constitutions; the subsequent revival of that concept in the Federal Constitution, and in its still later judicial interpretation, did not derive primarily from Coke. Blackstone was undoubtedly widely read in America after 1776, but the doctrine of legislative supremacy which he, like Locke, espoused, while it may have influenced those who drafted many of the early state constitutions, was later rejected by the founding fathers who wrote our Federal Constitution. The views of some of those Puritans who were active in Cromwell's day, both directly and as reflected in Harrington, had their effects; from them, it can be plausibly argued, came the ideas of a written constitution with provisions

54. Alexander Hamilton put the matter grandiloquently in 18th century terminology: "The Sacred Rights of Mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the Hand of Divinity itself, and can never be erased or obscured by mortal powers." I WORKS (2d ed. 1903) 113.

55. Jefferson once said of Montesquieu: "I am glad to hear of everything which reduces that author to his just level . . ." And again: "I had, with the world, deemed Montesquieu's work of much merit; but saw in it, with every thinking man, so much of paradox, of false principle and misapplied fact, as to render its value equivocal on the whole." 5 JEFFERSON'S WRITINGS (Washington's ed. 1853) 539, quoted in Franklin, *The Judiciary State* (1940) 2 NAT. LAWYERS GUILD Q. 244, 247. And he said of the Virginia county courts, which performed such non-judicial duties as supervising schools, levying taxes, voting expenditures, and appointing sheriffs: "I acknowledge the value of this institution; it is in truth our principal executive and judiciary." Quoted in DICKINSON, *supra* note 5, at 34, n.5. See note 29 *supra*. The willingness to violate Montesquieu's views did not cease with the adoption of the Constitution: "At the very outset of the new Government, Jay had held for six months the office of Chief Justice and Secretary of State of the United States . . . ; Ellsworth was for a year and a half Chief Justice and Minister to France; . . . Marshall served both as Chief Justice and Secretary of State for over a month in 1801." 1 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (2d ed. 1928) 275.

for checks and balances; but the notion of a judiciary with power to declare statutes unconstitutional cannot be ascribed to them.<sup>56</sup>

Who, in truth, can say with accuracy what are the "influences" which move men? What they have read often has some effect. But men, particularly when creative, do not merely reproduce the thoughts of others. Those thoughts may be provocative, stimulative. But the stimulus may result not in imitation but in originality. It is the pedant, lacking originality himself, who assumes that there is nothing new under the sun, that new ideas are simply the mathematical equivalent of older ideas. Creation is more chemical than mechanical or mathematical. There are psychological, as well as biological, "sports" and mutations. Coleridge reads the narratives of English sea-voyages; there emerges, as Lowes has shown,<sup>57</sup> a poem, containing, it is true, phrases from those old tales, but built into a work of art which is far more than the mere product of those borrowed words. Veblen, as Dorfman discloses,<sup>58</sup> scans the pages of anthropologists and sociologists; no one would say that *The Theory of The Leisure Class* is any mere copy of what his predecessors had said, although their ideas undoubtedly goaded his thinking. New wine goes into old bottles, but the important fact is not the antiquity of the bottles. More than that, often the bottles themselves are new and only the antique labels remain.

And so with our 18th century American statesmen. Their handiwork—so more and more intelligent historians are coming to conclude—was largely the result of their reactions to their own unique experiences, first in the struggle with the English government and the colonial governors, and later in the precarious period of difficulties between the states in the period after independence. "Indigenous experience" says

56. See SCHNEIDER, *op. cit. supra* note 32, at 147-51; SABINE, *A HISTORY OF POLITICAL THEORY* (1937) c. 24; 6 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (1924) 151-56; MERRIAM, *op. cit. supra* note 30, at 92-93.

57. LOWES, *THE ROAD TO XANADU* (2d ed. 1930) 35, 37, 48, 53, 142, 160, 427. He shows us how "at any moment a page which Coleridge was reading might become electrical, and set free the currents of creative energy." The "shaping spirit of imagination must have materials on which to work." But "the marshalling of a shapeless confusion of scattered recollections into clarity, order and form"—that is the work of vital imagination. "One of the most momentous functions of the imagination" is "its sublimation of brute fact." By observing what a great man has read we can "retrace the obliterated vestiges of creation." For "the imagination never operates in a vacuum. Its stuff is always fact of some order, somehow experienced; its product is that fact transmuted." He also says: "I hope it is clear that I do not care a rap for the question of so-called literacy borrowing *per se*. The most supremely original performances . . . have sprung into being through some electric contact of one mind with another . . ."

For other accounts of the workings of the creative imagination, see WALLAS, *THE ART OF THOUGHT* (1926); VALÉRY, *VARIETY* (1938) 60; LEUBA, *THE PSYCHOLOGY OF RELIGIOUS MYSTICISM* (1925) 241; G. N. LEWIS, *THE ANATOMY OF SCIENCE* (1926); POINCARÉ, *SCIENCE AND METHOD* (1914); cf. FRANK, *LAW AND THE MODERN MIND* (1931) 169.

58. DORFMAN, *THORSTEIN VEBLEN AND HIS AMERICA* (1934).

Wright; "autochthonous development," says Corwin, were the vital stimuli.<sup>59</sup> MacIver suggests that the influences of European writers varied with varying American attitudes which may be grouped into three stages—the period up to 1772, that from 1772 to 1782 and that from 1782 to 1789.<sup>60</sup> In other words, as native attitudes changed under the impact of events, so the authorities relied upon, or the weight given to a particular authority, also changed. To find "authority" for a position which they reached—accidentally or as the result of compromise or as a product of original genius—must have been pleasing to those American statesmen, as it is, at times, to all men. Precedents often do aid thinking; often, too, they allay inner doubts and help, as rationalizations, to persuade others. But, as one notes the manner in which our forebearers used their precedents, one recalls Kipling's lines:

"When 'Omer smote 'is bloomin' lyre  
He'd 'eard men sing by land an' sea;  
An' what he thought 'e might require,  
'E went an' took—the same as me!"<sup>61</sup>

59. Wright, *The Origins of the Separation of Powers in America* (1933) 13 *ECONOMICA* 169, 176; "It is one of the most curious facts in the history of the United States that the legislative-executive quarrels during the colonial period convinced the colonists of the desirability of a separation of powers rather than a union of powers . . . Doubtless the writings of the English and French publicists who upheld the theory of separation of powers played a considerable part in consolidating and strengthening the American preference for government of this kind. So far as I can see, there is no possible way of determining just how much influence they did exert. For the most part references to their writings come after rather than before the constitutions were drafted. They seem, that is to say, to be quoted by way of explaining and justifying what had already been done . . . In this, the first of the great periods of modern constitution writing, it was indigenous experience which determined the character of the fundamental laws." Corwin, *supra* note 9, at 402, 403 ff., shows that the colonists' arguments against the English just before and during the American Revolution, were "soundly based on autochthonous development;" each colony, it was then contended, "had its own parliament which was the supreme law making power within its territorial limits." He cites, as typical, the Virginia constitution where "the horn of the legislative department is mightily exalted, that of the executive correspondingly depressed;" adding that the judges "were the legislature's appointees, and judicial review is nowhere hinted." He says that "in 1776 the influence of Coke and Locke was no longer the predominant one that it had been. In the very process of controversy with the British Parliament, a new point of view had been brought to American attention." (italics supplied).

Cf. McILWAIN, *CONSTITUTIONALISM AND THE CHANGING WORLD* (1939) c. 10; MOTT, *DUE PROCESS OF LAW* (1926) 137.

60. *European Doctrines and The Constitution in THE CONSTITUTION RECONSIDERED*, (Read's ed. 1938) 51.

61. For comments on the influence of divers authorities, see also Corwin, *supra* note 9, at 394, 404-05; CORWIN, *COURT OVER THE CONSTITUTION* (1938) 23-24; GUGLIELMO, *Constitutional History and Law* (1938) 38 *COL. L. REV.* 555, 566-67.

For seemingly inconsistent views on the subject, expressed by Pound, see POUND, *Common Law and Legislation* (1908) 21 *HARV. L. REV.* 383-92; POUND, *CONTEMPORARY JURISTIC THEORY* (1940) 25 ff.; POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1938) 41-42; POUND, *SPECIAL REPORT TO THE AMERICAN BAR ASS'N* (1938); POUND, *THE PLACE OF THE JUDICIARY IN A DEMOCRATIC POLITY* (1941) 133.